

# FRONT LINE

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OFFICE OF MISSOURI ATTORNEY GENERAL

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## ID theft investigation leads to felony charges



Prosecuting Attorney Robert Wilkins and Attorney General Nixon jointly filed charges.

A Miami, Fla., man who allegedly stole the identities of Missourians online to purchase and receive thousands of dollars worth of merchandise and gift cards has been charged with two criminal counts of identity theft filed in Missouri.

The felony charges against Henry



Henry Berry

Lee Berry were filed jointly by Attorney General Jay Nixon and Jefferson County Prosecuting Attorney Robert Wilkins.

The investigation also involved the Secret Service, U.S. Postal Inspection Service, Florida Attorney General's Office, and the Miami and Pembroke Pines, Fla., police departments.

**ID Theft  
Hotline**  
**800-392-8222**

Nixon has set up a hotline to help Missourians recognize and report identity theft. He also now has a complaint form online at [ago.mo.gov](http://ago.mo.gov) for victims to report theft.

## Internal affairs reports may be open records

The Missouri Supreme Court in 2001 issued an opinion in *Guyer v. City of Kirkwood* that indicated inactive complaints against officers may be open records if the complaint asserted a potential criminal act by the officer.

Prior to *Guyer*, most police agencies were successful in keeping internal

affairs records closed based on the argument that personnel records were closed under the Sunshine Law.

The potential impact of *Guyer* was shown in *State ex rel. City of Springfield v. Brown*, decided by a state appeals court in November 2005.

In *Brown*, a defendant charged with

assault on three officers sought the internal affairs files of his purported victims. He argued he was entitled to their files because his defense was that the officers were the initial aggressors.

The city of Springfield resisted the

SEE **INTERNAL AFFAIRS**, Page 2

## Civil liability for domestic abuse calls clarified

A December 2005 story in Front Line reported on a case where the U.S. Supreme Court held that officers are not liable for a constitutional violation for failing to enforce an order of protection, even when their failure to do so results in a death.

Several trainers and chiefs were concerned that some officers may

think there is no liability under any circumstances for failing to enforce an order of protection or to respond appropriately to a domestic abuse call.

**To clarify:** While there is no liability for a civil rights violation, there may still be liability under

SEE **CIVIL LIABILITY**, Page 2

## Lawmakers considering tougher penalties on sex offenders

As the 2006 legislative session gets into full swing, the top legislative priority in the area of criminal law is to increase prison terms for certain sex crimes against children.

SEE **SEX OFFENDERS**, Page 2

**INTERNAL AFFAIRS:** CONTINUED FROM PAGE 1

defendant's request, believing the records should be confidential and that records of other alleged instances of misconduct by the officers would be irrelevant to whether the defendant is guilty.

The appeals court held that the city had to produce internal affairs records of all other citizen complaints of misconduct against the officers.

After *Guyer*, the court held that, while there is a statutory provision authorizing the closure of personnel files, Section 610.100 requires disclosure of "inactive" records of potential criminal allegations. Public policy is a "tiebreaker in favor of disclosure."

As to the relevance of prior citizen complaints against the officers, the court noted that the Missouri Supreme Court greatly expanded the admissibility of "self-defense" evidence in the 2005 case of *State v. Gonzales*.

Under *Gonzales*, a criminal defendant can produce evidence of a victim's past aggressiveness as admissible evidence to prove the victim was the initial aggressor.

In other words, the defendant in this case may be able to introduce evidence that citizens had complained about these three

**HB 1807 would close some internal investigations**

HB 1807, filed by Rep. Kenny Jones, adds a new exception to the Sunshine Law to allow certain internal investigations to be closed by a law enforcement agency.

This proposal is a response to *Guyer v. City of Kirkwood*, where the Missouri Supreme Court held that a complaint alleging criminal misconduct by an officer and the subsequent investigation would be open under Section 610.100 once the investigation is closed.

HB 1807 has been assigned to the House Judiciary Committee.

officers — even if the claims were not substantiated — in order to prove that the three officers actually were the initial aggressors and assaulted him.

This decision will not necessarily be limited to cases where the defendant is charged with assaulting an officer. Agencies need to be prepared for an increased number of requests for officers' personnel files by criminal defendants through the criminal discovery process.

**SEX OFFENDERS:** CONTINUED FROM PAGE 1

Several bills have been filed in the House and Senate, and most of the Senate bills have already received a hearing in the Senate Judiciary Committee.

A number of the bills are modeled on Florida's Jessica's Law, which mandates a minimum 25-year sentence for certain sex crimes against children.

This legislation also includes proposed changes to Missouri's sex offender registration law.

**Review proposed sex offender bills on Web**

Search under the phrase "sex offenders" to identify the sex crime bills being considered.

- Senate bills: [senate.mo.gov](http://senate.mo.gov)
- House bills: [house.mo.gov](http://house.mo.gov)

**CIVIL LIABILITY:** CONTINUED FROM PAGE 1

**Castle Rock, Colorado v. Gonzales**  
No. 04-278  
June 27, 2005

or a violation of a protective order.

In *Castle Rock v. Gonzales*, the U.S. Supreme Court held that police officers who failed to take action to

Missouri's tort law for failure to take action when an officer is aware of a domestic assault

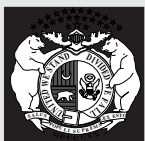
find a father who had taken custody of his three young daughters in violation of an order of protection were not liable for a constitutional violation, even though their failure resulted in the father killing his three girls.

Liability may, however, exist under state law, which gives officers little discretion in how to respond to a domestic assault or to a violation of an

order of protection.

In most cases, an arrest is to be made because Missouri law was intended to reflect a public policy that takes domestic abuse very seriously.

Failing to do what the law clearly requires an officer to do can create liability under Missouri law. Officers cannot ignore domestic abuse. Failure to respond can result in civil liability.



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## UPDATE: CASE LAW

Opinions can be found at [www.findlaw.com/casecode/index.html](http://www.findlaw.com/casecode/index.html)

### MISSOURI SUPREME COURT

#### STEALING THIRD OFFENSE

##### **Terry J. Woods v. State**

No. 87028, Mo. banc, Dec 6, 2005

Stealing third offense requires the previous guilty pleas to be on separate occasions. This statute originally did not contain the "separate occasion" language; the General Assembly later changed the law to include this language.

#### PRO SE DEFENDANT, FIRST-DEGREE MURDER

##### **State v. David Stanley Zink**

No. 86358, Mo. Banc, Nov. 22, 2005

In this capital case, the trial court did not err in allowing defendant to represent himself and in failing to replace standby counsel appointed from the public defender's office. Defendant voluntarily, knowingly and intelligently waived his right to counsel during trial.

The court gave him two opportunities to reconsider his decision before the trial began, and both times he declined.

### EASTERN DISTRICT

#### FIRST-DEGREE ROBBERY, DOUBLE JEOPARDY

##### **State v. Chancell Gridiron**

No. 84435, Mo.App., E.D., Nov. 8, 2005

The court reversed defendant's conviction of first-degree robbery and armed criminal action for insufficient evidence that property was taken forcibly from a second person as required under state law. Gridiron was convicted improperly of two counts of robbery in violation of the prohibition against double jeopardy. The count of first-degree robbery and armed criminal action charge violated his right to be free from double jeopardy where it was based on one act of force directed to one victim.

#### PLAIN ERROR REVIEW, CLOSING ARGUMENT, JUROR MISCONDUCT

##### **State v. Jeffrey Bourrage**

No. 85476, Mo.App., E.D., Nov. 8, 2005

Defendant did not prove the prosecutor's rebuttal argument had a decisive effect on the outcome of the trial.

The court presumed the jurors weighed the testimony and made a credibility determination to reach their verdict. The court also noted that the trial court instructed the jury that the attorneys' arguments are not evidence, presuming the jurors followed this instruction.

The defendant also did not prove harm from any alleged juror misconduct. Defendant speculated that the communication between defendant and a juror could have been observed or overheard by other jurors. However, the evidence revealed that the communication occurred "far away" from the courthouse and that defendant and the juror were alone.

While defendant speculated the juror may have conveyed the contents of the communication to other jurors, the trial court instructed both the venire panel and the seated jury that they were not to discuss the case among themselves, and the court presumed the juror followed these instructions. The trial court promptly removed the juror.

#### BIFURCATED TRIALS, EVIDENCE OF ACQUITTED CRIMES

##### **State v. Calvin Kevin Clark**

No. 84783, Mo.App., E.D., Dec. 6, 2005

Evidence of acquitted crimes was admissible during the sentencing phase of the trial. A jury's verdict of acquittal does not prevent the court, in the sentencing phase of the trial, from considering conduct underlying the acquitted charge, as long as that conduct has been proved by a preponderance of the evidence.

#### RESISTING ARREST, SUFFICIENCY OF EVIDENCE

##### **State v. Wilbert Hunter**

No. 85151, Mo.App., E.D., Nov. 29, 2005

There was insufficient proof that defendant reasonably should have known that, when he saw a police car following a pickup in which he was a passenger, he was being arrested for felony burglary.

The record did not contain sufficient facts from which reasonable jurors could have found that defendant was fleeing from an officer, the officer was arresting defendant or even that the officer was contemplating defendant's arrest.

Also, the officer never testified that when he turned on his patrol lights and followed the pickup, he intended to arrest defendant for burglary.

The court declined to enter a judgment of misdemeanor resisting arrest because the jury was not required to find all of the elements of misdemeanor resisting arrest in order to convict defendant of felony resisting arrest.

### WESTERN DISTRICT

#### INSTRUCTIONAL ERROR, CLAIM OF RIGHT DEFENSE

##### **State v. Mardell Lynn January**

No. 64109, Mo.App., W.D., Nov. 22, 2005

The court reversed defendant's convictions of second-degree burglary and stealing when the court failed to instruct on claim of right defense.

Once the issue of claim of right is injected into the case, the state had the additional burden of proving that she took the property with an honest belief that she had a right to do so, in the same way the state must prove all the other elements of stealing.

Since the trial court failed to instruct on the claim of right defense, the state was essentially relieved of proving a disputed element of its case beyond a reasonable doubt.

This is automatic plain error, requiring an automatic finding of manifest injustice and a miscarriage of justice.

**UPDATE: CASE LAW****WESTERN DISTRICT****CONFRONTATION CLAUSE,  
EXCITED UTTERANCE IN 911 CALL****State v. Lamont C. Kemp**

No. 64501, Mo.App., W.D., Nov. 8, 2005

The statements made by a hysterical victim when she was stopped while attempting to run down the street were excited utterances and admissible under the hearsay exception. The statements made to a 911 operator, which were greatly redacted for the jury, did not offend the confrontation clause because the statements were not testimonial in nature or the result of interrogation. The 911 statements also could reasonably be regarded as excited utterances under an exception to the hearsay rule.

Whether a 911 call is "testimonial" would necessarily be fact-specific. These statements appear to have been made for the purpose of obtaining help and police assistance, not for the purpose of aiding a police investigation and prosecution.

Even if the 911 operator might be considered a government officer, the operator was not filling the role of an investigator. There is no indication that any party contemplated that the contents of the call would be used in court, or that the operator was attempting to build a case for prosecution.

**SUFFICIENCY OF EVIDENCE,  
KNOWINGLY COMMITTING VIOLENCE  
AGAINST CORRECTIONAL OFFICER****State v. Harold D. Heyn**

No. 26633, Mo.App., W.D., Oct. 27, 2005

There was sufficient evidence to prove beyond a reasonable doubt that defendant knowingly committed violence against a DOC employee. Defendant knew the victim was his parole officer because she had supervised him since his release from the penitentiary, and was solely in charge of investigating whether defendant had violated the conditions of his parole.

**FRYE HEARING,  
LUMINOL BLOOD TESTING****State v. Henry Daniels**

No. 63642, Mo.App., W.D., Oct. 25, 2005

The court reversed defendant's conviction of second-degree murder and remanded for a new trial, holding the trial court abused its discretion in denying defendant's pretrial motion to exclude the evidence and his request for a Frye hearing.

While the state introduced positive luminol test results as scientific evidence to prove conclusively the presence of blood, evidence was introduced that luminol testing is an initial test to determine the presence of blood and that additional laboratory testing is required to prove scientifically the presence of blood.

**ENDANGERING WELFARE OF CHILD,  
CHARGES/SUFFICIENCY OF EVIDENCE****State v. Stacy R. Todd**

No. 65090, Mo.App., W.D., Nov. 29, 2005

The court affirmed defendant's conviction for second-degree endangering the welfare of a child for leaving her 9-year-old son alone and locked in her car on a hot summer day while she gambled at a casino. Sufficient evidence supported the finding that defendant's conduct presented a substantial risk to the child and that she acted with criminal negligence.

**METH, CONSPIRACY  
TO MANUFACTURE/POSSESSION****State v. Shane M. Beggs**

No. 64068, Mo.App., W.D., Dec. 13, 2005

The trial court plainly erred in entering judgments for both conspiracy to manufacture meth and possession of lithium batteries with the intent to manufacture meth because the possession of lithium batteries formed a partial basis for the conspiracy charge.

There was sufficient evidence to find either that defendant intended to use the lithium batteries to make meth or he intended to trade the batteries to a third party to use to manufacture meth.

**EVIDENCE OF OTHER CRIMES,  
OTHER SEX CRIME VICTIMS****State v. Allen B. Berwald**

No. 64445, Mo.App., W.D., Nov. 25, 2005

The court reversed defendant's conviction of first-degree statutory rape and second-degree statutory sodomy, holding the trial court abused its discretion in admitting the trial testimony of two of defendant's adult daughters regarding uncharged acts of sexual abuse he purportedly committed against them as children 20 to 30 years before trial.

The state failed to overcome the presumption of prejudice that is created when evidence of uncharged crimes is admitted erroneously over proper and timely objection by demonstrating that the error was harmless beyond a reasonable doubt. The state did not show there is no reasonable probability the jury would have acquitted but for the erroneously admitted evidence.

**SOUTHERN DISTRICT****GUILTY PLEA, PROBATION****Robert A. Spears v. State**

No. 26834, Mo.App., S.D., Nov. 28, 2005

The circuit court did not err in denying probation because there was no evidence movant was promised probation following his guilty plea for DWI that he would be released and placed on probation if he successfully completed a 120-day treatment program.

The trial judge concluded that release of movant on probation or a statutory release would be an abuse of discretion based on reports that movant would not commit to quit using alcohol. It stated that movant did not consider driving drunk to be a crime and that movant acknowledged that he drove when he was drunk "all the time."



## UPDATE: CASE LAW

### SOUTHERN DISTRICT

#### INEFFECTIVE COUNSEL, IMPEACHMENT/INSTRUCTIONS

##### **Frankey L. Coday v. State**

No. 26327 & 26351, Mo.App., S.D.,  
Nov. 30, 2005

In this appeal from a Rule 29.15 proceeding, based on a conviction of first-degree murder and armed criminal action, the circuit court clearly erred in granting the motion for ineffective assistance of counsel for failing to impeach a prosecution witness. There was no showing the proposed impeachment created a reasonable probability that the trial's outcome would have been different.

The court erred in ordering a new trial because trial counsel was ineffective for failing to request a modification of the accomplice liability instruction. Counsel testified that she did not request this modification because it would have been inconsistent with the alibi defense.

The motion court also erred in ordering a new trial because trial counsel was ineffective for failing to object to testimony based on *Bruton v. United States*. The testimony was admissible as the statements of a co-conspirator engaged in a continuing conspiracy with the defendant.

#### FIRST-DEGREE ASSAULT, SERIOUS PHYSICAL INJURY/STABBING

##### **David Gregory Orr v. State**

No. 26719, Mo.App., S.D., Nov. 30, 2005

There was sufficient factual basis to support a guilty plea to first-degree assault with serious physical injury by stabbing the victim repeatedly. The injuries created a substantial risk of death or caused serious disfigurement or protracted loss or impairment of the function of parts of his body. The



#### D.A.R.E. TRAINING

Attorney General Nixon, right, talks with O'Fallon Police Officer Andy Stowers and Bo, a police dog with the department. Nixon gave welcoming remarks to new D.A.R.E. officers. They were in Jefferson City attending a training session sponsored by the Missouri Police Chiefs Association.

consequences of these injuries were magnified because the victim was in a weakened condition because he was recovering from colon cancer.

#### CRIMINAL NONSUPPORT, FAILURE TO PROVIDE ADEQUATE SUPPORT

##### **State v. Robin Lee Pettry**

No. 26631, Mo.App., S.D., Nov. 28, 2005

Defendant failed to meet his burden of injecting the issue of good cause for failure to provide adequate support in a prosecution for criminal nonsupport. The state was not required to prove defendant's failure to provide adequate support for his children was without good cause.

#### MIRANDAS, INVOCATION OF RIGHT TO REMAIN SILENT

##### **State v. Gerald E. Rayborn**

No. 26635, Mo.App., S.D., Nov. 28, 2005

The court did not err in refusing to declare a mistrial when a detective testified about defendant's response after being given his Miranda warnings.

The court did not find that the only conclusion the jury could have reached was that defendant had invoked his right to remain silent and to have an attorney present. The court offered to advise the jurors to disregard the detective's

statement, but the offer was declined by defense counsel.

#### PROSECUTORIAL VINDICTIVENESS

##### **State v. Allen D. Potts**

No. 26531, Mo.App., S.D., Nov. 23, 2005

The court reversed defendant's conviction of possession of a controlled substance with the intent to distribute for prosecutorial vindictiveness.

After a mistrial was granted during jury selection, the prosecutor entered a nolle prosequi on the original charge of possession and re-filed with the heightened charge of possession with intent to distribute on the same day.

There is nothing in the record to suggest that the prosecutor was unaware of the facts necessary to bring the higher charge before the trial began, nor that the prosecutor's purpose was anything other than to deter the defendant from, or punish him for, exercising his rights at trial.

The court stressed that the holding was based upon the facts and circumstances of this case and did not suggest that all cases in which a prosecutor brings higher charges after a defendant has successfully sought a mistrial justify applying a presumption of vindictiveness.

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## **AG's Office takes consumer complaints**

Attorney General Nixon reminds the law enforcement community that his office is available for consumers to report problems with businesses and file complaints.

Citizens can call the Consumer Protection Hotline during normal business hours or submit a complaint by going to [ago.mo.gov](http://ago.mo.gov).

Cases handled by the Attorney General's Office include misrepresentations and fraud in the sale of goods or services. The office mediates consumer disputes and returned a record \$3.4 million through mediation in 2005, but also can bring both civil and criminal legal action in these types of cases.



### **FILE A COMPLAINT**

Electronically submit a form at [ago.mo.gov](http://ago.mo.gov) or call the Consumer Protection Hotline at **800-392-8222**.

## **SB 578, funeral protest bill, signed into law, now in effect**

The governor signed a bill on Feb. 23 that will prohibit picketing or protests of any funeral from one hour before the funeral starts until one hour after the funeral ends.

Senate Bill 578, modeled on legislation from other states, is in response to a recent protest of a military funeral in St. Joseph.

The bill makes it a class B misdemeanor for a first offense and a class A misdemeanor for a second offense. It also contains an emergency clause, meaning that it took effect upon the governor's signature.

A companion bill, HB 1026, has been heard in the House Crime Prevention Committee.

## **MOPS, Highway Safety sponsoring DWI training this spring**

The Missouri Office of Prosecution Services and the Division of Highway Safety are sponsoring a DWI training conference to be held May 31 to June 2 at Tan-Tar-A Resort in Osage Beach.

The seminar, which is POST accredited for law enforcement officers, will start at 1 p.m. on May 31 and end at noon on June 2.

Conference registration is \$60 and must be paid by May 30. Make checks payable to "MOPS Revolving Fund." The fee includes a noon luncheon on June 1 for attendees and speakers.

The fee does not pay for hotel rooms. A block of rooms will be available at Tan-Tar-A for the first two nights. The rate is \$79 per night inclusive of lodging tax. The block of

rooms is available until April 30. After that, it will depend on availability.

For reservations, call Tan-Tar-A at 800-826-8272. Mention that you will be attending the MOPS conference to get the room rate.

For more information, call Bev Case at 573-751-0619 or Susan Glass at 573-751-1629.